



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, ASIKE-MAKHANDIA & KIAGE, JJ.A)**

**CIVIL APPEAL (APPLICATION) NO. 628 OF 2019**

**BETWEEN**

**MARY SIDI MENDZA.....1<sup>ST</sup> APPLICANT**

**JANE NJERI NGERU.....2<sup>ND</sup> APPLICANT**

**AND**

**ANDREW KAMAU DENIS KUBAI.....RESPONDENT/APPELLANT**

**AND**

**CHRISTINA GAKUHI KUBAI.....RESPONDENT**

*(An appeal from the Ruling and orders of the High Court of Kenya (Family Division) at Nairobi (Asenath Ongeru, J.) dated 2nd August, 2019 in H.C.C.C No. 1940 of 1996)*

**\*\*\*\*\* Consolidated with Succession Cause No. 1860 of 1996) \*\*\*\*\***

**RULING OF THE COURT**

[1] What is before us today is a notice of motion dated 24th August 2020 which has been filed in person by the applicants, **Mary Sidi Mendza** and **Jane Njeri Ngeru** (1st and 2nd applicants). We reproduce herein verbatim the substantive orders sought by the applicants:

***“(i) Spent.***

***(ii) That this honourable court be pleased to enjoin applicants herein as interested parties in the Civil Appeal No. 628 of 2019.***

***(iii) This honourable court be pleased to grant an order for setting aside the judgment and orders delivered by Lady Justice Asenath Ongeru on 2nd August, 2019.***

***(iv) That this honourable court be pleased to issue orders causing legal representation in place of Moses Mendza Kibuthu Kubai deceased/Petitioner in Civil Appeal No. 628 of 2019.***

**(v) That costs of this application be provided for.”**

[2] The application is supported by affidavits sworn by the 1st applicant and also written submissions that the applicants have duly filed.

[3] The application is opposed through a replying affidavit filed by the respondent **Christina Gakuhi Kubai** (Christina) who is represented by Kamau Kuria & Co. Advocates. The advocates have also filed written submissions and bundle of authorities.

[4] The motion has a chequered history. It is anchored on a succession dispute dating back to 1st June 1996 when **Fredrick Polwarth Kibuthu Kubai** (deceased) died. Christina, who claimed to be the deceased's wife, filed a petition for grant of probate with Will annexed. Prior to her application, **Samson Owen Kubai Kibuthu, Stephen Gideon Kibuthu F. Kubai, Gideon Blacklaw**

**Kubai** and **Martin Gideon Kubai**, had obtained letters of administration intestate for the estate of the deceased. In her petition, Christina also sought to have the letters of administration intestate revoked and/or annulled. Christina's petition was opposed by the intestate administrators who contested the Will claiming it was not written by the deceased, and further denied that Christine was not a wife to the deceased.

[5] On 19th December 2013, the High Court (**Musyoka, J**) having heard Christina's petition and the objection, ruled that the hand written document dated 19th January, 1991 was a valid Will of the deceased, and that Christina was a wife to the deceased.

[6] Following some legal tussles that we do not find it necessary to go into, Christina filed summons for confirmation of grant under Section 71 of the Law of Succession Act, and Rules 39 and 40 of the Probate and Administration Rules.

[7] **Moses Mendza Kibuthu Kubai** (Moses) a son to the deceased, and **Andrew Kamau Denis Kubai** (Andrew) a grandson to the deceased, filed summons under section 26 of the Law of Succession Act, seeking to be provided for as dependants. During the hearing of the motion, Moses also challenged the Will contending that it was not a valid Will of the deceased.

[8] Upon hearing the application, the High Court (**Ongeri, J**) ruled that the issue of the validity of the Will had already been determined in the High Court judgment of 19th December, 2013 (**Musyoka, J**); that no appeal had been filed against that judgment and the court could not revisit the issue; and that as Andrew was a grandchild of the deceased, and there was no evidence that he was depending on the deceased before the deceased died, he was not entitled to be provided for in the estate. The learned Judge noted that the deceased had catered for his beneficiaries who were his children, his wife, and previous wives, and had made reasonable provision for each of them. She therefore, confirmed the grant of probate and ordered the properties to be distributed in accordance with the deceased's hand written Will.

[9] Being dissatisfied with the ruling of the High Court, Andrew filed Civil Appeal No. 628 of 2019 in this Court contending that the learned Judge of the High Court had misdirected herself in finding that he was not a beneficiary, and that he had no *locus standi* in the estate. Andrew claimed that he was acting on behalf of his late father, one **Samson Owen Kibuthu** by virtue of a power of attorney donated to him by his mother; that the learned Judge disregarded his evidence and that of Moses, which was credible; that the Judge did not consider that the beneficiaries listed by Christina in her summons for confirmation of the grant of probate, included children who were not the legitimate children of the deceased; and that Christina relied on forged documents. Andrew therefore sought orders setting aside the judgment delivered on 2nd August, 2019 and allowing the revocation of the grant of probate issued by **Musyoka, J.** on 19th December, 2013.

[10] In the meantime, Moses died on 6th June, 2020. The applicants who are children of Moses contend that they are beneficiaries of the estate of their deceased father, and that Moses had been disputing the validity of grant of probate issued to Christina, and had indicated through a notice of appeal dated 13th

August, 2019 his intention to appeal against the ruling of 2nd August 2019, they should be allowed as persons who had interest in the deceased's appeal, to be joined in Civil Appeal No 628 of 2019 hence the order sought in the motion.

[11] We have considered the motion before us. It is clear that Civil Appeal No. 628 of 2019 was filed by Andrew on 18th December 2019, which was about 5 months before Moses died. The applicants have annexed a notice of appeal dated 13th August, 2019 prepared by Khaminwa & Khaminwa advocates, and filed in the High Court on 14th August, 2019. The notice of appeal is filed on behalf of Moses although he is indicated as a respondent. It indicates an intention to appeal against the ruling of 2nd August 2019. No further documents have been availed to confirm whether any appeal was actually filed by Moses before he died on 1st June, 2020. It was contended that Moses did not obtain any leave from the court to file the appeal. However, according to the ruling of the High Court dated 22nd November, 2019, the High Court granted leave to the applicant to appeal to the High Court, although the heading of the ruling indicates that the applicant was Christina and Moses the respondent. The ruling does not make any reference to Andrew but refers to Dr. John Khaminwa SC who was actually representing Moses. It would appear therefore, that the applicant who was granted leave to file an appeal through the ruling of 22nd November 2019 was Moses, but he does not appear to have filed any appeal.

[12] The applicants cannot therefore be substituted as parties in Civil Appeal No 628 of 2019 in place of Moses, when he was not a party in the appeal. It is true that under Rule 77 of the Court Rules an appellant is required to serve a notice of appeal within 7 days from the date of lodging the notice, on all parties who are directly affected by the appeal, and in this case Moses would have been entitled to participate in the appeal filed by Andrew as a person directly affected by the appeal having been a party in the High Court. However, Moses having died during the pendency of the appeal, the applicants could only pursue the appeal for the benefit of the estate of Moses, if they were appointed as legal representatives/administrators of the estate of Moses (See **Trouistik Union International & Anor v Mbeyu & Anor [1993] KLR 230**). Therefore, even assuming for the sake of argument that Moses had filed a proper appeal, or that he was an affected party in the appeal filed by Andrew, the applicants have not demonstrated that they have been appointed as administrators or legal representatives of Moses's estate. They therefore have no locus to be substituted in his place, nor do they have any locus to challenge the ruling of 2nd August, 2019 merely because they are children/beneficiaries of Moses.

[13] For these reasons, we find that the motion is improperly before us. It is accordingly struck out. As the matter involves a family dispute, we find it appropriate to make no orders as to costs.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of February, 2021.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**ASIKE MAKHANDIA**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**